U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15360780

Date: FEB. 16, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a software development company, seeks to employ the Beneficiary as a computer systems analyst under the second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish its continuing ability to pay the Beneficiary the proffered wage from the priority date. The Director granted a subsequent motion to reopen and affirmed the denial of the petition on the same ground.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition.[1] The priority date in this case is March 14, 2019. The labor certification states that the wage offered for the job of computer systems analyst is $154,790 per year. The petition was filed on July 31, 2019.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.[2]

Absent evidence that the Petitioner has paid the Beneficiary a salary equal to or above the proffered wage from the priority date onward, USCIS will generally examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage, or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing

[1] The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

[2] In this case, the record, including the labor certification, indicates that the Beneficiary has not been employed with the Petitioner at any time.

business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The Petitioner claims to be a software development company established in 2014 with three employees. With the initial submission, as evidence in attempt to show its ability to pay the proffered wage, the Petitioner submitted letters from two banks stating account balances. One letter, dated July 29, 2019, states the Petitioner's current balance as $100,480. The second letter, dated June 26, 2019, verifies an account balance of $150,000; however, this letter does not identify the Petitioner as the account holder, but rather is addressed solely to the Petitioner's president as what appears to be a personally held asset. The Petitioner also submitted its 2018 operating agreement. The Director issued a request for evidence (RFE) dated November 20, 2019, advising the Petitioner that this evidence was not sufficient to establish its ability to pay the proffered wage because bank statements are not among the three types of evidence enumerated in 8 C.F.R. § 204.5(g)(2).

The Petitioner's response to the RFE is dated February 12, 2020. In response to the RFE, the Petitioner submitted its Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income for 2018, as well as evidence of the Petitioner's owner's personal assets and the Petitioner's five-year operating plan. The Petitioner's 2018 tax return reflects that it is a domestic limited liability company (LLC) with a net income loss of -$800 and net current assets of $0.[3] The Petitioner did not provide any additional information related to its ability to pay in 2019.

The Director denied the petition, concluding that the Petitioner's 2018 tax return did not establish its continuing ability to pay the proffered wage because its net income and net current assets were below the wage offered. The Director also concluded that the Petitioner's other evidence was not evidence prescribed in 8 C.F.R. § 204.5(g)(2) and did not demonstrate, in the totality of the circumstances, its continuing ability to pay the proffered wage.

The Petitioner filed a motion to reopen the petition on April 27, 2020, which the Director granted. With the motion the Petitioner submitted an updated five-year business plan and a letter from its accountant that was already in the record with the RFE response. The Petitioner did not submit its federal tax return, or other regulatory prescribed evidence for 2019. As the Petitioner claimed its fiscal year as a calendar year, its 2019 tax return would have been due before the filing of its motion to reopen on April 27, 2020. The Petitioner has not submitted evidence that any extension of its 2019 tax filing was granted or requested.

[3] Schedule L, Balance Sheet per Books, of the Petitioner's 2018 tax return is blank. Schedule L to IRS Form 1065 is not required to be completed if the partnership meets all four of the requirements shown on the Form 1065, Schedule B, at question 4. The requirements include: total receipts for the tax year are less than $250,000; total assets at the end of the tax year are less than $1,000,000; Schedules K-1 are filed with the return and furnished to the partners on or before the due date (including extensions) for the partnership return; and the partnership is not filing and is not required to file Schedule M-3. *See* http://www.irs.gov/instructions/i1065/ (accessed February 16, 2021).

The Petitioner's accountant states, in a letter dated February 8, 2020, that it reviewed the Petitioner's five-year business plan, a letter from the Petitioner's bank confirming its account balance,[4] and various account statements for the Petitioner's owner. Based on this review, the accountant states, "There are sufficient assets, including current and projected from the business activity, for Petitioner to meet its financial obligations. In addition, Petitioner's owner, ..., shows the financial ability to support Petitioner should the need arise." The Director again reviewed the Petitioner's evidence of its continuing ability to pay the proffered wage, including the totality of the circumstances, and affirmed his denial.

On appeal, the Petitioner asserts that the Director did not properly consider the totality of circumstances to determine its ability to pay the proffered wage. The Petitioner does not submit new supporting evidence, but in the brief prepared by the Petitioner's counsel, it highlights the following facts it deems relevant to its continuing ability to pay:

- The Petitioner has existed since 2014 and remained active, although it is a start-up business, and it did not implement its business plan immediately.
- The Petitioner began operating its business pursuant to its business plan in 2019, after revising the plan in 2018 and 2019, and has financial projections in place.
- The Petitioner has $100,000 in liquid cash in its corporate bank account.
- The Petitioner is a closely held business with owners who have a track record of running successful businesses.
- The Petitioner's majority shareholder has substantial personal assets with which he will support the startup operations, including $150,000 in cash, $400,000 in retirement accounts, and $800,000 in real property equity.
- The Petitioner's accountant performs forensic accounting services and has provided an expert opinion that the company has the ability to pay wages.

At the outset, we note that the California Secretary of State lists the Petitioner's current status as suspended by the Franchise Tax Board for failing to meet tax requirements.[5] The last recorded filing of the Petitioner's business documents with the Secretary of State was in January 2019, more than two years ago. With any further filings, the Petitioner must demonstrate its good standing with the California Secretary of State, as well as its valid and ongoing business operations to show that it has a valid full-time job to offer the Beneficiary.

We also note that the Petitioner claims on Schedule B of its tax return to be a domestic LLC, and on Schedule K-1 to have two equal partners. An LLC, like a corporation, is a legal entity separate and distinct from its owners. *See Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, No. Civ. A. 02-30197-MAP, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The debts and obligations of the company generally are not the debts and obligations of the

[4] It is unclear whether the letter reviewed is the same letter in the record, or a different letter with different account information.

[5] *See California Secretary of State, Business Search Entity Detail*, available at https://businesssearch.sos.ca.gov/CBS/Detail (last visited January 28, 2021).

owners or anyone else.[6] An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate a petitioner's ability to pay the proffered wage. Therefore, counsel for the Petitioner erroneously relies on the Petitioner's owner's personal assets in attempt to establish its ability to pay the proffered wage. Further, the Petitioner's accountant lists the Petitioner's owner's assets among the evidence it reviewed to make its opinion that the Petitioner has the ability to pay the proffered wage. However, the Petitioner, as an LLC, must show the ability to pay the proffered wage out of its own funds. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988).

We also agree with the Director that the Petitioner's bank statements do not conclusively establish the Petitioner's ability to pay. First, the evidence the Petitioner provided is not in the form of a monthly or annual bank statement, but rather in the form of letters from the bank stating an account balance on a specific date. The Petitioner did not provide any bank statements demonstrating a record of transactions over any period of time or to corroborate the account holder's name and account number. While one letter does state the Petitioner's name and last four digits of an account number, the second letter is addressed personally to the Petitioner's shareholder and does not indicate that it is a business account or provide any account number. As noted above, the Petitioner is a separate entity and personal assets cannot be used to demonstrate the Petitioner's ability to pay the proffered wage. Bank statements show the amount in an account on a given date and cannot show the sustainable ability to pay an annual proffered wage. Here, the bank letters demonstrate, at most, that the Petitioner held a business account with a balance of $100,480 on July 29, 2019. Nothing demonstrates that this cash would be a separate resource from that which would be found on the Petitioner's Schedule L, and would be considered in an analysis of the Petitioner's net current assets. Without regulatory prescribed evidence in the record for 2019, the year of the priority date, we cannot conclude from the bank letter that the Petitioner had a continuing ability to pay the proffered wage.

Here, the record lacks evidence of the Petitioner's reputation or of its historical growth over its five years in business. As noted above, California state records show that the business is currently "suspended" for failing to meet tax requirements. The Petitioner has not described any uncharacteristic business expenditures or losses. Other than approximately $100,000 in a bank account on one date in 2019, the Petitioner has not submitted any additional evidence of its finances during the year of the priority date and continuing to the present. The Petitioner's 2018 tax return as addressed above showed a net loss, and contained no information related to its net current assets. The tax return includes no entries for income, including gross receipts, no salaries or wages paid in 2018, and the only deduction listed is for taxes and licenses. We conclude that the Petitioner has not established its ability to pay the annual proffered wage of $154,790 from the priority date based on the totality of the circumstances. Therefore, the appeal is dismissed on this basis.

[6] Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

III. THE BENEFICIARY'S EMPLOYMENT EXPERIENCE

The accompanying labor certification states that the position of computer systems analyst requires a bachelor's, or foreign equivalent degree, in Computer Science and five years of experience in the job offered or in a same or similar position, as well as specific computer software application skills. The record establishes that the Beneficiary possesses the equivalent of a U.S. bachelor's degree in computer science based on her bachelor of computer science degree from [redacted] University in [redacted] Canada, completed in 2007.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Although not addressed by the Director, the Petitioner should have an opportunity to address information that casts doubt on the Beneficiary's claimed employment experience and specific skills. On the labor certification, the Beneficiary claims to have been employed as a computer systems analyst with [redacted] from January 2, 2008 until at least the date the labor certification was filed on March, 14, 2019. In support of this experience, the Petitioner submitted a letter dated May 29, 2019 on [redacted] letterhead. The letter is signed by [redacted] CEO. USCIS records demonstrate that the Beneficiary and [redacted] are siblings.

If the author did not properly identify herself as a relative, USCIS may have been precluded from assessing the credibility and proper weight to be accorded to such evidence. To be probative, a document must generally provide: (1) the nature of the affiant's relationship, if any, to the affected party; (2) the basis of the affiant's knowledge; and (3) a specific - rather than merely conclusory - statement of the asserted facts based on the affiant's personal knowledge. *Matter of Chin*, 14 I&N Dec. 150, 152 (BIA 1972); *see also* 8 C.F.R. § 103.2(b)(2)(i) (requiring affidavits in lieu of unavailable required evidence from "persons who are not parties to the petition who have direct personal knowledge of the event and circumstances"); *Matter of Kwan*, 14 I&N Dec. 175, 176-77 (BIA 1972); *Iyamba v. INS*, 244 F.3d 606, 608 (8th Cir. 2001); *Dabaase v. INS*, 627 F.2d 117, 119 (8th Cir. 1980). While a petitioner may submit a letter or affidavit that contains hearsay or biased information, as may be the case here, such factors will affect the weight to be accorded the evidence in an administrative proceeding. *See Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011) (citations omitted). Probative evidence beyond a letter or affidavit may be required to resolve inconsistencies or discrepancies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance of the evidence, USCIS must examine each piece of evidence - both individually and within the context of the entire record - for relevance, probative value, and credibility. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Therefore, we cannot affirmatively find that the Beneficiary possesses the experience required for the offered position based on the experience letter in the record. In any further filings the Petitioner must submit additional independent objective evidence in support of the Beneficiary's employment and specific skills experience.

IV. CONCLUSION

In accord with the analysis above, the Petitioner has not established its ability to pay the proffered wage from the priority date as required by 8 C.F.R. § 204.5(g)(2) or in an examination of the totality of the circumstances. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). The Petitioner has not met that burden. In any further filings the Petitioner must also demonstrate that the Beneficiary is in possession of the minimum experience required for the offered position. Therefore, the appeal will be dismissed.[7]

ORDER: The appeal is dismissed.

[7] As an additional issue that must be addressed in any further filings, the Petitioner checked "no" to question C.9 on the labor certification, "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, corporate officers, incorporators, or partners, and the alien?" However, a copy of the Petitioner's federal income tax return for 2018 identifies one of the company's shareholders by the same family name as the Beneficiary's mother and sibling. Although the Petitioner attested that, as of the filing of the labor certification application, the Beneficiary had no family relationships to the company's owners, officers, or incorporators, the common family name of the Beneficiary's mother and sibling and the 2018 shareholder raise a question whether she might have shared a family relationship with a shareholder of the Petitioner as of the application's filing and also raises the question whether this fact may have been misrepresented on the labor certification. Thus, in any future filings in this matter, the Petitioner must disclose any family relationships between the Beneficiary and the company's owners, officers, or incorporators as of the application's filing. *See Matter of Modular Container Sys., Inc.*, 89-INA-228, slip op. at *9 (BALCA July 16, 1991) (*en banc*) (holding that a foreign national's relationship to a petitioning corporation's director, officer, or employee may indicate the unavailability of the offered job to U.S. workers).